Sin-Kung Logistics (KL) Sdn Bhd v Projek Lebuhraya Usahasama Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(W)-1920–09 OF 2017
IDRUS HARUN, YEOH WEE SIAM AND RHODZARIAH BUJANG JJCA
11 JUNE 2019

Evidence — Documentary evidence — Admissibility — Documents admitted without makers being called — Whether s 73A of Evidence Act 1950 wrongly applied — Evidence Act 1950 s 73A

Tort — Vicarious liability — Employer — Evasion of payments of tolls at express highways by employee — Whether principle of vicarious liability wrongly applied — Federal Roads (Private Management) Act 1984 ss 2(1), 8(1) & (2)

The appellant ('the defendant') was sued under the tort of vicarious liability by the respondent ('the plaintiff') for partial and/or full evasion of payments of tolls at the express highways, used by the appellant's lorry drivers. The plaintiff's claim was premised on the unpaid tolls by 19 lorries registered under the defendant's name, using the tolls at the North South Expressways. The plaintiff's authority to collect the said tolls was provided under s 2(1) of the Federal Roads (Private Management) Act 1984 ('the Act') and the defendant's ownership of the said vehicles were not facts in dispute and neither was the fact that they were used by the defendant's employees in the course of their employment. The defendant's main defence to disclaim liability was that the tolls should be collected from their lorry drivers and that those drivers had been reimbursed by them for the payment of the tolls. The plaintiff's claim was substantiated by a documentary evidence known as PV Form ('the form') which was filled up by the toll operators upon any violation at the toll booth. The form contained crucial information on the date, time, place of incident as well as the registration number of the vehicle committing the transgression and the amount of unpaid tolls. The form was signed by the toll booth operator on duty at that material time and co-signed by the supervisor. The amount claimed by the plaintiff was substantiated by 5,390 of the forms and 570 witnesses were supposed to be called to tender the forms before the court. However, only 122 witnesses were called and this was because the learned High Court judge was of the view that it would be a sheer waste of judicial time to hear the rest of the witnesses who would be giving the same evidence and that the primary evidence being the forms. Further the learned High Court judge said s 73A of the Evidence Act 1950 ('the EA') allowed primary documents to

be tendered without the necessity of calling the maker to the court. The learned High Court judge then proceeded to hear the evidence adduced from the sole witness of the defendant who produced a record of all the toll payments made by the defendant's drivers and for which refunds had been made based on the receipts issued by the plaintiff's toll booths operators. The High Court ruled that the defendant was vicariously liable and accepted the accuracy of the contents of the forms over the receipts produced by the defendant and therefore the plaintiff's claim had been proven on a balance of probability. The issues for consideration were whether s 73A of the EA and principle of vicarious liability had been wrongly applied by the learned High Court judge.

Held, dismissing the appeal with cost:

(1) Section 73A(2) of the EA clearly gave the court the power to admit the forms documentary evidence without calling their makers. It was not just a question of a few witnesses going to be called to tender the forms but hundreds of them and to give evidence on a very mundane issue of whether the tolls had been paid, which was for a paltry sum. The amount stated in one PV form represented a fraction of the debt claimed by the plaintiff, nonetheless the calling of hundreds of these witnesses would definitely caused undue delay to the completion of the trial. Given the peculiarity of the evidence in support of the claim which was the forms and the standard information contained therein, their admission without calling for their respective makers was permissible under s 73A of the EA. Admittedly the defendant, by that course of action had been denied the right to cross-examine the witnesses but that did not infringe the rule of natural justice (see paras 17–18).

(2) The fact that some of the toll booth operators were unable to see the registration number of the lorries when shown the CCTV taken at the scene was not fatal to the plaintiff's case because these recordings were merely corroborative evidence, the primary one being the forms themselves which was recorded on the spot by their makers. The defendant's complaint that the learned High Court judge had ignored the production of the original toll receipts proof of payments was misplaced because the learned High Court judge did consider them. On these considerations, the findings of the learned High Court judge were affirmed (see paras 19–20).

(3) There could be no argument that by reason of s 2(1) of the Act, the right of the plaintiff to collect toll was from the users of the highway or road for which the concession was given to them or that by virtue of s 8(1) and (2) of the Act, the said user would commit an offence and incurred a penalty when no such payment of the toll was made and that the plaintiff as concessionaire could recover the unpaid toll by an action in law. By the operation of s 8(1) of the Act, payment of the toll was one which was

statutorily provided for in the Act. It was an entrenched part of the principle of vicarious liability that an employer could only be made liable for the act of his employee committed during or in the course of employment and there was never any denial that the defendant's lorry drivers were on duty at that material time when the offences were committed. Therefore the raising of the principle as a basis to sue the defendant in this case was fully justified (see paras 21–22).

[Bahasa Malaysia summary

Perayu ('defendan') telah disaman di bawah tort liabiliti vikarius oleh responden ('plaintif') kerana mengelak sebahagian dan/atau sepenuhnya bayaran tol di lebuh raya, yang dilakukan oleh pemandu lori perayu. Tuntutan plaintif didasarkan pada tol yang tidak dibayar oleh 19 lori yang didaftarkan di bawah nama defendan, menggunakan tol di Lebuhraya Utara Selatan. Kuasa plaintif untuk mengutip tol tersebut telah diperuntukkan di bawah s 2(1) Akta Jalan Persekutuan (Pengurusan Persendirian) 1984 ('Akta') dan pemilikan defendan terhadap kenderaan tersebut bukanlah fakta yang dipertikaikan dan juga fakta bahawa ia telah digunakan oleh pekerja defendan semasa pekerjaan mereka. Pembelaan utama defendan untuk menafikan liabiliti adalah bahawa tol harus dikutip dari pemandu lori mereka dan bahawa pemandu-pemandu tersebut telah dibayar semula oleh mereka untuk pembayaran tol. Tuntutan plaintif telah diasaskan oleh keterangan dokumentari yang dikenali sebagai Borang PV ('borang') yang diisi oleh pengendali tol atas apa-apa pelanggaran di plaza tol. Borang tersebut mengandungi maklumat penting berkenaan tarikh, masa, tempat kejadian serta nombor pendaftaran kenderaan yang melakukan pelanggaran dan jumlah tol yang tidak dibayar. Borang itu ditandatangani oleh pengendali plaza tol bertugas pada masa itu dan ditandatangani oleh penyelia. Jumlah yang dituntut oleh plaintif telah diasaskan oleh 5,390 borang dan 570 saksi sepatutnya dipanggil untuk mengemukakan borang di hadapan mahkamah. Namun, hanya 122 saksi dipanggil dan ini adalah kerana hakim Mahkamah Tinggi berpendapat bahawa ia akan menjadi satu pembaziran masa kehakiman untuk mendengar saksi-saksi lain yang akan memberikan bukti yang sama dan bahawa bukti utama adalah borang tersebut. Hakim Mahkamah Tinggi menyatakan s 73A Akta Keterangan 1950 ('AK') membenarkan dokumen-dokumen utama dikemukakan tanpa perlu memanggil pembuat ke mahkamah. Hakim Mahkamah Tinggi kemudian meneruskan untuk mendengar keterangan yang dikemukakan oleh saksi tunggal defendan yang mengeluarkan rekod semua pembayaran tol yang dibuat oleh pemandu defendan dan yang mana pembayaran balik telah dibuat berdasarkan penerimaan resit yang dikeluarkan oleh pengendali plaza tol plaintif. Mahkamah Tinggi memutuskan bahawa defendan adalah bertanggungjawab secara vikarius dan menerima ketepatan kandungan borang berkenaan mengatasi resit yang dihasilkan oleh defendan dan oleh itu tuntutan plaintif telah dibuktikan di atas imbangan kebarangkalian. Isu-isu untuk pertimbangan adalah sama ada s 73A AK dan

prinsip liabiliti vikarius telah salah digunakan oleh hakim Mahkamah Tinggi.

Diputuskan, menolak rayuan dengan kos:

(1) Seksyen 73A(2) AK jelas memberi mahkamah kuasa untuk menerima borang tersebut keterangan dokumentari tanpa memanggil pembuatnya. Ia bukan sekadar persoalan tentang beberapa saksi yang akan dipanggil untuk mengemukakan borang tetapi beratus-ratus saksi dan untuk memberi keterangan mengenai isu yang sangat lazim sama ada tol telah dibayar, yang merupakan jumlah yang sangat kecil. Amaun yang dinyatakan dalam satu borang PV mewakili sebahagian kecil daripada hutang yang dituntut oleh plaintif, namun panggilan ratusan saksi-saksi ini pastinya menyebabkan kelewatan yang tidak wajar untuk menyelesaikan perbicaraan. Memandangkan keistimewaan keterangan yang menyokong tuntutan yang merupakan borang dan maklumat standard yang terkandung di dalamnya, penerimaan mereka tanpa memanggil pembuatnya adalah yang dibenarkan di bawah s 73A AK. Diakui bahawa defendan, oleh tindakan itu telah ditolak hak untuk memeriksa balas saksi tetapi itu tidak melanggar peraturan keadilan asasi (lihat perenggan 17–18).

(2) Hakikat bahawa beberapa pengendali plaza tol tidak dapat melihat nombor pendaftaran lori apabila ditunjukkan CCTV yang diambil di tempat kejadian tidak memudaratkan kepada kes plaintif kerana rakaman ini hanyalah keterangan menyokong, yang utama adalah borang tersebut sendiri yang telah dicatatkan serta merta oleh pembuatnya. Aduan defendan bahawa hakim Mahkamah Tinggi telah mengabaikan pengeluaran bukti bayaran resit tol asal adalah tidak betul kerana hakim Mahkamah Tinggi telah mempertimbangkannya. Dengan ini, penemuan hakim Mahkamah Tinggi telah disahkan (lihat perenggan 19–20).

(3) Tidak dapat dipertikaikan bahawa oleh sebab s 2(1) Akta, hak plaintif untuk mengutip tol adalah daripada pengguna lebuh raya atau jalan yang mana konsesi itu diberikan kepada mereka atau oleh sebab s 8(1) dan (2) Akta, pengguna tersebut akan melakukan suatu kesalahan dan menanggung penalti apabila tidak ada pembayaran tol tersebut dan bahawa plaintif sebagai konsesi boleh mendapatkan kembali tol yang tidak dibayar dengan tindakan undang-undang. Dengan pelaksanaan s 8(1) Akta, bayaran tol adalah satu yang diperuntukkan secara statutori di dalam Akta. Ia merupakan sebahagian daripada prinsip liabiliti vikarius yang majikan hanya boleh dipertanggungjawabkan atas perbuatan pekerjanya yang dilakukan semasa atau ketika menjalankan pekerjaan dan tidak pernah ada penafian bahawa pemandu lori defendan sedang bertugas pada masa material apabila kesalahan dilakukan. Oleh sebab itu, prinsip yang ditimbulkan sebagai dasar untuk menuntut

defendan dalam hal ini adalah sangat wajar (lihat perenggan 21–22).] A

Cases referred to

Chandran G Nair & Ors v Affin Bank Bhd [2015] 1 MLJ 59; [2014] 1 LNS 569, CA (refd)
Majrowski v Guy's and St Thomas's NHS Trust [2005] EWCA Civ 251, CA (refd) B
Projek Lebuhraya Utara Selatan v Pernas Forwarding Agency Sdn Bhd [2014] 2 MLJ 893, CA (folld)
Ramasamy a/l Auraippan v Kwan Lee Pin (Majlis Peguam Malaysia, Intervener) [2018] 6 MLJ 528, CA (distd) C

Legislation referred to

Evidence Act 1950 s 73A, 73A(1), (2), (2)(a)
Federal Roads (Private Management) Act 1984 ss 2(1), 8(1), (2)
Rules of Court 2012 D

Appeal from: Civil Suit No MT4–22–334 of 2006 (High Court, Shah Alam)

Diana Ling (Elaine Gan with him) (Elaine & Diana) for the appellant.
Krishna Dallumah (T Thirunaaukarasu and K Jegathis Kumar with him) (Thiru Jegatish & Assoc) for the respondent. E

Rhodzariah Bujang JCA:

[1] The appellant, the defendant in the High Court, was sued under the tort of vicarious liability by the respondent/plaintiff for partial and/or full evasion of payments of tolls at the express highways, used by the appellant's lorry drivers. The respondent was the concession holder of the said express highways and was given full authority under the Federal Roads (Private Management) Act 1984 to collect toll from users of the said highways. Hereinafter, in this judgment the parties would be referred to as they were in the High Court. This is in part to facilitate a better understanding of our reasons for dismissing the appeal against the High Court's decision to allow the claim of the plaintiff in the sum of RM518,369.27 because there was a history of litigation between the parties prior to this decision of the High Court which was on appeal before us. F G H

LITIGATION HISTORY

[2] This was briefly set out by the learned High Court judge in his grounds of judgment and he was actually the second judge to hear the case. The first High Court judge, after hearing 65 witnesses dismissed the plaintiff's claim on 6 February 2014 before the conclusion of the trial which His Lordship did based on this court's decision in *Projek Lebuhraya Utara Selatan v Pernas Forwarding Agency Sdn Bhd* [2014] 2 MLJ 893 which held that the above I

mentioned principle of vicarious liability does not apply to vehicle owners and that toll payments could only be collected from the users of the highway by the plaintiff who was highway concessionaire. That decision of the first learned High Court judge was reversed by this court on 25 September 2014 and the High Court was ordered to resume the trial of the action. An application for leave to appeal to the Federal Court by the defendant was rejected.

[3] The said trial did not resume thereafter in the High Court because the first learned High Court judge transferred the case to the sessions court given that the monetary amount claimed was within its jurisdiction under the new Rules of Court 2012. This decision was reversed by this court on appeal and it was only upon that reversal that the trial was continued before the learned High Court judge who then heard another 122 witnesses before coming up with the decision which was on appeal before us. We heard the appeal on 19 March 2018 and dismissed the same with cost to the plaintiff. The defendant then filed an application for leave to appeal to the Federal Court and this judgment is written pursuant to a directive issued by the Federal Court for it be written for the purpose of that leave application.

THE CLAIM

[4] The plaintiff's claim was premised on the unpaid tolls by 19 lorries registered under the defendant's name, using the tolls at the North South Expressways. The plaintiff's authority to collect the said tolls is provided under s 2(1) of the Federal Roads (Private Management) Act 1984 ('the Act') and the defendant's ownership of the said vehicles were not facts in dispute before the High Court and us and neither was the fact that they were used by the defendant's employees in the course of their employment. The defendant's main defence to disclaim liability was that the said tolls should be collected from their lorry drivers and that those drivers had been reimbursed by them for the payment of the said tolls. The plaintiff's claim was substantiated by a documentary evidence known as PV Form ('the form') which was filled up by the toll operators upon any violation at the toll booth. The form contained crucial information on the date, time, place of incident as well as the registration number of the vehicle committing the transgression and the amount of unpaid tolls. The form was signed by the toll booth operator on duty at that material time and co-signed by the supervisor.

[5] The amount claimed by the plaintiff was substantiated by 5,390 of the forms and altogether 570 witnesses were supposed to be called to tender the forms before the court. However, as stated earlier, only 122 witnesses were called and this was because the learned High Court judge was of the view that since it was indicated to him that the remaining witnesses would be giving the same evidence as the earlier ones and that the primary evidence being the forms

which were produced before the court, it would be a sheer waste of judicial time to hear the rest of the witnesses who had been subpoenaed. This was what His Lordship said at para 18 of his judgment:

> There would be massive wastage of judicial time in going through the motion of hearing all the 570 witnesses given the same answers to the same questions. As a record the Court noted that only a maximum of 25 witnesses could be called a day. Wastage of time is not a prime consideration but a factor which the Court can take into account in deciding upon a case.

[6] Further His Lordship said s 73A of the Evidence Act 1950 allows primary documents to be tendered without the necessity of calling the maker to the court. Relevant to this appeal is s 73A(1) and (2)(a) and the same are produced below:

> (1) Notwithstanding anything contained in this Chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied:
>
> (a) if the maker of the statement either —
>
> (i) had personal knowledge of the mattes dealt with by the statement; or
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> (ii) where the document in question is or forms part of a recording purporting to be a continuous record, made the statement (so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters; and
>
> (b) if the maker of the statement is called as a witness in the proceedings:
>
> Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, nor unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.
>
> (2) In any civil proceedings, the court may at any stage of the proceedings, *if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused*, order that such a statement as is mentioned in subsection (1) shall be admissible as evidence or may without any such order having been made, admit such a statement in evidence —
>
> (a) *notwithstanding that the maker of the statement is available but is not called as a witness;* (Emphasis added.)

[7] The learned High Court judge then proceeded to hear the evidence adduced from the sole witness of the defendant who produced a record of all the toll payments made by the defendant's drivers and for which refunds have been made based on the receipts issued by the plaintiff's toll booths operators.

FINDINGS OF THE LEARNED HIGH COURT JUDGE

[8] Two were made by the learned High Court judge. The first and major one was on the doctrine of vicarious liability and His Lordship decided not to follow this court's decision in *Projek Lembaga Lebuhraya Utara Selatan Berhad*'s case but relied on that made by this court in ordering the trial to resume because in para 8 of the latter judgment, this court appears to adopt a contrary decision from the earlier one. The said para 8 reads as follows:

> [8] It is also not clear from the Court of Appeal judgment if the defendant had authorised the employees to use the express highway and if so, whether the defendant will be obliged to pay the toll charges if the employees had not paid the toll charges at common law, and whether if the court condones such non-payment will result in unjust enrichment to the defendant.

[9] His Lordship then concluded on this issue by saying as follows:

> 31. Reading in between the 2 Court of Appeal decisions it can be inferred that the 2 decisions are not in tandem and therefore this Court is at liberty to rely on any one of them. In this case the Court agrees with the second Court of Appeal decision which states that vicarious liability is a common law concept. This Court notes that the common law principle of vicarious liability was in existence even before any statutory provision to collect revenue. It therefore follows that the House of Lord decision in *Majrowski*'s case is better statement of law that the general rule that the employer is liable vicariously for any wrongdoing of its employee unless the statute itself absolves the employer from liability.
>
> In this case the Act does not in any way absolve the employer from vicarious liability and in fact the phrase 'user' should include the employer as the actual user of the highway is the vehicle which belongs to the Defendant. The drivers are merely employed to facilitate the business of the Defendant by driving the vehicles. Section 8 of the Act allows apart from imposing a criminal penalty to allow the tolls not paid to be recovered for the use of the road.
>
> The Court therefore rules that the Defendant is vicariously liable for the violation of its drivers if it is proven that the drivers have failed to pay or have not paid the full amount of the toll.

[10] The word 'user' referred to by the learned High Court judge is derived from the word 'uses' in s 8(1) of the Act which is reproduced below with sub-s (2):

> (1) Any person who *uses* or attempts to use any road, bridge or ferry in respect of which an order under section 2 has been made without payment of the tolls

prescribed in the order shall be guilty of an offence and shall, on conviction, be punished with a fine of not less than two thousand ringgit and not more than five thousand ringgit.

(2) Notwithstanding subsection (1) tolls due and payable by virtue of an order made pursuant to section 2 may be recoverable by action at law by the person so authorized under the said section. (Emphasis added.)

[11] In respect of the second issue on the payment of the toll, the learned High Court judge considered the receipts of payment of the tolls tendered by the defendant and observed that the vehicle registration numbers were not printed on the receipts. Therefore the defendant cannot disprove that payments were not made as stated in the forms although some of the receipts bore the same date and time of the violation as stated in the forms. However, the learned High Court judge held that this does not mean that the information in the forms was wrong for the receipts could have been obtained by the defendant's drivers elsewhere. The learned High Court judge then said that he accepted the accuracy of the contents of the forms over the receipts produced by the defendants and therefore the plaintiff's claim had been proven on a balance of probability.

[12] Before concluding, His Lordship dealt with this one last matter on the payment of the tolls and it is as follows:

A final matter on the payment of toll was the contention of the Defendant that on the date of the alleged violation the Plaintiff had issued receipts for many of the vehicles showing full payment. This matter was explained by the Plaintiff's witnesses that not all the drivers of the Defendant's drivers committing the violation had driven through the toll booth without stopping. There were many of the Defendant's drivers who had stopped and given the toll ticket to the toll booth operators which were then fed by the toll both operators into their computer system. Once the ticket had been put into the computer the toll operators had to complete the transaction regardless of whether the toll had been paid or not. This was the reason the receipt which was subsequently issued showed full payment. This full payment was only on paper. The Court accepted this explanation given by the Plaintiff's witnesses.

THE APPEAL

[13] Before us two issues were raised by learned counsel for the defendant. The first is on the application of s 73A of the Evidence Act 1950 and the second on the principle of vicarious liability both of which she contended have been wrongly applied by the learned High Court judge.

First Issue: Section 73A

[14] It was not disputed that the forms were in Part C of the plaintiff's bundle of documents or that their makers were available to testify on the said documents. In other words both their authenticity and content were disputed at the trial. Learned counsel for the defendant submitted that admitting the rest of the said documents without their makers being called had deprived the defendant of their right to cross-examine them and was a breach of natural justice even though the cross-examination of the said witnesses could be similar with the ones who had previously been called to testify and were cross-examined. These documents, submitted learned counsel further were crucial because each one constitutes a debt to be paid and the learned High Court judge's reliance on this court's decision in *Chandran G Nair & Ors v Affin Bank Bhd* [2015] 1 MLJ 59; [2014] 1 LNS 569 to support his use of the said s 73A was wrong.

[15] In the said cited case, the issue was on the admissibility of the certificate of indebtness relied upon by the respondent to prove the damages it sought against the appellant but the maker of that certificate was not called as a witness by the respondent which therefore rendered it inadmissible held this court. This court, after holding so further opined, at para 35 of the judgment as follows:

> [35] It is significant to note that for some untold reason the respondent did not at any time attempt to rely on the provisions of s 73A(2), which provides:
>
> > (2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence:
> >
> > (a) notwithstanding that the maker of the statement is available but is not called as a witness; and
> >
> > (b) notwithstanding that the original document is not produced, if, in lieu thereof, there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.
>
> If indeed the respondent was in such a position. For the learned trial judge to act under s 73A(2) it would have been imperative for the respondent to move the court to do so.

[16] Learned counsel for the defendant after referring to this decision in para 22 of their written submission, then said this at para 23:

> 23. By adopting the above principles into our present case, there was no conclusive evidence agreement made between the Plaintiff and the Defendant, hence the

learned Judge is erred by accepting the PV forms as conclusive proof of violation and subsequently debts to be collected from the Defendant. (sic)

[17] With respect to learned counsel, we do not agree that the said section can only be utilised by the court only if there was a conclusive evidence agreement between the parties as in *Chandran*'s case. The said s 73A(2) clearly gave the court the power to admit the forms documentary evidence without calling their makers '… if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused …'. We can see and appreciate where the learned High Court judge was coming from for it was not just a question of a few witnesses going to be called to tender the forms but hundreds of them and to give evidence on a very mundane issue of whether the tolls had been paid and if we may add, which was for a paltry sum. Admittedly, the amount stated in one PV form represented a fraction of the debt claimed by the plaintiff, nonetheless the calling of hundreds of these witnesses would definitely caused undue delay to the completion of the trial. The learned High Court judge, we must add had pertinently noted the evidence from all the 122 witnesses called that the forms were filled up immediately after the transgression being committed and it took only 2–3 minutes for them to fill it up whilst the other vehicles behind would wait. Equally important is what His Lordship noted at the next para 13–15 of the grounds of judgment as follows:

All the 122 witnesses were also firm in their answers that they had noted the number plates on the PV for having seen the number plates when the vehicle entered and exited the toll booth. Some of the witnesses saw the number plate once on entry or exit but all confirmed seeing number plate clearly. Further all the 122 witnesses testified that the toll booth were well lighted and they could clearly see the number plates when challenged by the Defendant's counsel that as many of the incident of violation occurred early in the morning they could not have been the number plates clearly.

All the 122 witnesses were also consistent in stating that they could not remember the weather condition at the time of violation or the colour of the vehicle or the details of the drivers apart from what had been noted in the PV form due to lapse of time and memory.

It was indicated to the Court that the same questions would be posed to all the other remaining witnesses by the Defendant's counsel as all of them were also toll booth operators carrying out the same duties as the 122 witnesses. The Court could not envisage that these other witnesses would drastically depart from the answers given by the 122 witnesses. It is pertinent to note that the Defendant did not challenge the fact that the toll booth operators had filled up the PV forms, the challenge was more as to accuracy of the information contained therein.

[18] Therefore, given the peculiarity of the evidence in support of the claim in this case which was the forms and the standard information contained therein, their admission without calling for their respective makers was in our

A view permissible under the said s 73A. Admittedly the defendant, by that course of action had been denied the right to cross-examine the witnesses but that in our view does not infringe the rule of natural justice because it is not the same situation as in the case of *Ramasamy a/l Amaippan v Kwan Lee Pin (Majlis Peguam Malaysia, intervener)* [2018] 6 MLJ 528 quoted by the defendant's B counsel. In the cited case, the respondent accused the appellant (her solicitor) of failing to return to her an overpayment of RM51,500 relating to the purchase of a house and also lodged a police report against him but did not turn up at the hearing before the Advocates and Solicitors Disciplinary Board. Instead she sent her husband to testify at the hearing. The said Board after the C hearing recommended that the appellant be suspended from practice for 12 months and ordered him to pay the respondent the said sum of RM51,500. It is crystal clear that the facts in the cited case is distinguishable from the present one for there was just one accuser and the whole case rested on her allegation against her solicitor. To reiterate, the evidence of the toll booth operators in this D case, would be repetitive and we said this because from our own examination of notes of proceeding we have no cause to disagree with the learned High Court judge that it would be so, even when there exists some differences in some of the cross-examination of the toll booth operators.

E

[19] As for the fact that some of the toll booth operators were unable to see the registration number of the lorries when shown the CCTV taken at the scene, that is not fatal to the plaintiff's case because these recordings are merely corroborative evidence, the primary one being the forms themselves which, we F must stressed, was recorded on the spot by their makers.

[20] As for the production of the original toll receipts by the defendant which were tendered in court, the defendant's complaint that the learned High Court judge had ignored these proof of payments is, with respect, quite G misplaced because he did consider them as per para 37 of His Lordships judgment which we had reproduced earlier. On these considerations, we would affirm the findings of the learned High Court judge on this issue.

H VICARIOUS LIABILITY

[21] There can be no argument that by reason of s 2(1) of the Act, the right of the plaintiff to collect toll is from the users of the highway or road for which the concession was given to them or that by virtue of s 8(1) and (2) of the Act, I the said user would commit an offence and incurred a penalty when no such payment of the toll is made and that the plaintiff as concessionaire can recover the unpaid toll by an action in law. As stated earlier, the learned High Court judge relied on the decision of an English Court of Appeal in *Majrowski v Guy's and St Thomas's NHS Trust* [2005] EWCA Civ 251 at p 848 held that:

An employer may be vicariously liable for a breach of a statutory duty imposed on an employee but not on the employer.

[22] By the operation of s 8(1) of the Act, payment of the toll is one which is statutorily provided for in the Act as stated earlier. It is an entrenched part of the said principle of vicarious liability that an employer can only be made liable for the act of his employee committed during or in the course of employment and there was never any denial that the defendant's lorry drivers were on duty at that material time when the offences were committed. Therefore the raising of the principle as a basis to sue the defendant in this case, we would agree with the learned High Court judge, was fully justified and in saying so we endorsed the view of this court in its later decision in *Project Lebuhraya*'s case.

[23] On the considerations above, the appeal by the defendant was dismissed with cost by us on the 19 March 2018.

Appeal dismissed with cost.

Reported by Nabilah Syahida Abdullah Salleh